



# Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108  
phone: 617-727-0060, fax: 617-723-5851



## CONFLICT OF INTEREST OPINION EC-COI-95-10

### FACTS:

You are the Solicitor of a City. You seek an opinion on behalf of Ms. A, Chairperson of the City's Historic District Commission (Historic Commission). Ms. A was appointed to this uncompensated position by the City Council (Council).

In 1993, the City, through the efforts of its Mayor and other City officials, applied for and received from the Executive Office of Communities and Development (EOCD), a [amount omitted] start-up grant for use in developing an entity, which has evolved into the [City] Downtown Association, Inc. (Association). Ms. A also serves as a member of the Board of Directors of the Association.

### EOCD Downtown Partnership Program

EOCD receives from HUD Community Development Block Grant monies, some of which it awards to municipalities having populations of fewer than 50,000.<sup>1/</sup> One of those programs is the Downtown Partnership or Downtown Revitalization Program (Program). The Program's major objective is the elimination of urban slums and blight. Through the Program, EOCD seeks to involve and assist private enterprises in developing an entity through which they can work in partnership with their municipal governments to improve their urban environment through various activities, initiatives and projects (collectively, Downtown Projects).

Municipalities can apply to EOCD for initial Program funding to finance the start-up or so-called "emerging partnership" costs of an entity (Downtown Entity), which is generally, if not always, formed as a Massachusetts corporation under G.L. c. 180. EOCD refers to the cooperative working relationship between a municipality and its Downtown Entity as a "Downtown Partnership."<sup>2/</sup>

Downtown Entities include among their governing bodies representatives of a cross-section of the community, such as businesses, institutions, churches, civic organizations, property owners, community residents and municipal governments. EOCD strongly encourages open lines of communication between the municipality and the Downtown Entity constituting a Downtown Partnership. Among various ways of achieving such communication and information flow, EOCD generally recommends (but does not require) that some municipal officials serve as *ex officio* members<sup>3/</sup> of the governing body of the Downtown Entity and, likewise, that representatives of the Downtown Entity regularly attend meetings of the municipality's governing body.

Once the Downtown Entity has been formed, the municipality can apply to EOCD for and may be awarded up to three additional Program grants in each of the Entity's first three years of operation. That funding is provided for a variety of Downtown Projects, such as:

training; goal-setting; planning for downtown economic development; strategies for business retention, recruitment and start-ups; improvement of local regulations (zoning, permits, etc.); parking strategies; cooperative services; loans/grants for building rehabilitation (facades, signs); streetscape improvements; studies and programs in promotions and marketing; tourism development; downtown market analysis; loans for new and expanding business activities; and training and support for new businesses and entrepreneurial ventures.

Typically, as a Downtown Entity gains more experience during the 3-year period working in a Downtown Partnership relationship with its municipality, EOCD decreases the amount of funding to be allocated to the

Entity's project manager. At the end of the 3-year period, EOCD provides no further funding to the municipality to support the Downtown Entity, which is expected to operate self-reliantly thereafter with funds raised through its own efforts, *e.g.*, from members' dues and contributions, fund-raising programs and events and other government and private loans, grants and contributions (collectively, Other Funding Sources).

If EOCD approves a municipality's application for Program funding, EOCD enters into a grant agreement with the municipality, which enters into a subgrant agreement with the Downtown Entity. Pursuant to those two agreements, funding flows from EOCD to the municipality and thence to the Downtown Entity, provided that, at each contract level, the conditions for disbursing funds have been satisfied.

Although no statute, rule, regulation, order, ordinance or other law mandates the formation or maintenance of Downtown Entities, through EOCD Program grants, municipalities promote and support the formation, maintenance and operation of such Entities during their early stages. Among their goals in providing such funding, EOCD and the Program-grant-receiving municipalities hope and expect that the Downtown Entities will survive long-term and continue to work in Downtown Partnership relationships.

Twenty-three Downtown Entities have been funded with Program grants and are involved in Downtown Partnership relationships with Massachusetts municipalities.

### **Downtown Partnership: City and Association**

With the help of EOCD's \$[amount omitted] start-up grant, the Association was incorporated in [date omitted] to work with the City in a Downtown Partnership relationship. The Association's Articles of Organization set forth its principal purposes, namely:

- 1) To improve, better, market and revitalize the businesses and business community in the City's Downtown area;
- 2) To foster and promote the development of business and businesses in the City's Downtown area;
- 3) To promote and enhance the visual quality and appearance of the historic sites, businesses and structures within the City's Downtown area;
- 4) To preserve and enhance the visual quality and appearance of the historic areas, and public areas situated in the City's Downtown area;
- 5) To educate and inform the public, and in particular, the citizens of the City, of the location and background of historic sites in the City's Downtown area, and to promote and encourage the study and utilization of these historic sites by the public; and
- 6) To seek federal, state and other grants for the purposes of furthering the purposes set forth above.

The Association's by-laws (By-Laws) provide that its members may be "any person or business entity who has paid in full the dues established by the Board." The annual dues are [amount omitted]. The Association currently has more than 60 members, the vast majority of whom are representatives of local businesses and others of whom are elected or appointed City officials, representatives of churches and unaffiliated individuals.

The By-Laws require that the Association have a 15-member Board of Directors (Board). Five of the Board members serve *ex officio*:<sup>4/</sup> the Mayor; a representative of the Historic Commission (currently Ms. A); a representative of the City's public school system; and two private sector representatives, namely, the President of the City's Board of Trade and an officer of a City bank. The other ten Board members are elected by and from among the Association's members. The *ex officio* Board members (except for the Mayor) serve a 1-year term. The other Board members serve 3-year terms. The Board currently has fourteen members, eleven of whom (including the two *ex officio* business members) represent business interests<sup>5/</sup> and three of whom are the *ex officio* City officials.

The Association's president, secretary and treasurer are elected by the Board from among its members.

None of the Association's officers is a City official or other City employee.

The Association retains its own legal counsel and its own accountant. The Association's offices are located in a privately owned office building; it has its own furnishings and equipment or uses those of its private sector Board members.

Through a resolution adopted on [date omitted], the Council authorized the Mayor (i) to apply for and "take any action necessary to secure up to [amount omitted]" of Program funds "for the implementation of Ready Resource grant-funded activities for the Downtown Partnership of" the City and the Association, (ii) to execute all grant documents on behalf of the City and (iii) to expend the grant monies in accordance with the grant application and accompanying documents.<sup>6/</sup> The Mayor submitted the Program grant application to EOCD on [date omitted]. Through a Program grant agreement (Grant Agreement) dated [date omitted] with EOCD, the City received a "Phase II" Program grant (for the first year of EOCD's possible 3-year funding period) in the amount of [amount omitted] (Grant) for the following Downtown Projects: Downtown Manager's Salary/Benefits; Training and Technical Assistance; Market Analysis; Parking and Traffic Study; Design Guidelines; and Association's Administration.

At its [date omitted] meeting, the Council approved the associated Program subgrant agreement (Subgrant Agreement). On [date omitted], the City and the Association entered into the Subgrant Agreement under which the Association was engaged as the City's subgrantee to perform the following Downtown Project services and functions, among others, for a maximum of [amount omitted] (Subgrant):<sup>7/</sup> (i) to hire a downtown manager (Manager) to manage the day-to-day operations and finances of the Association, including assisting with the development and implementation of the Association's downtown revitalization program, coordinating work group activities, developing and overseeing promotional events, working with financial/lending institutions and government agencies to develop support programs for downtown businesses, preparing grant proposals, working with businesses and civic groups to organize special events and aesthetic improvements and promote the City's downtown and coordinating activities with the City's Community Development Office;<sup>8/</sup> (ii) to engage consultants to provide planning assistance in architectural design of aesthetic improvements, including commercial signs and facades; in professional fundraising planning and development to sustain the Association on a long-term basis; and in market analysis services to develop a market niche to enhance the long-term economic viability of the City's downtown; and (iii) to maintain and operate an Association office.

The Subgrant Agreement provides that the City's project representative will be its Community Development Chief Planner, specifies the method and schedule for disbursing the Subgrant, and includes dispute resolution provisions, which designate the City's Community Development Director as the first level of review and the Mayor as the second and final (without further recourse) level of review if the Association takes issue with amounts of payments or with nonpayment by the City.

The City does not delegate its duties or powers to the Association. Although the Association is subject to the terms and conditions of the Subgrant Agreement, it does not require City approval before it makes decisions or acts. It can and does act independently of the City. For example, the Association has hired a Manager, selected an architect and will be hiring other consultants to assist in market analysis and fundraising efforts. It has conducted a "Summerfest" and other events, business training seminars and breakfast gatherings for its members, has purchased and installed flower barrels in the City's downtown area and has given City officials advice and input about particular design and infrastructure projects affecting the downtown area.

At the end of the EOCD funding period, the Association plans to operate independently with revenues raised from Other Funding Sources.

## **QUESTIONS:**

1. Is the Association a municipal agency or a private entity for purposes of the conflict of interest law?
2. May Ms. A serve as a member of the City's Historic Commission while serving as a member of the Association's Board of Directors?

## **ANSWERS:**

1. The Association is a private entity for purposes of the conflict of interest law.
2. Yes, subject to the limitations discussed below.

## DISCUSSION:

### A. Threshold Question

The threshold question is whether or not the Association is a municipal agency<sup>9/</sup> or a private entity for purposes of the conflict of interest law.

To determine whether an entity (including a non-profit corporation such as the Association) is a public agency or an instrumentality thereof, the Ethics Commission (Commission) has developed and will consider the following four factors:

- (1) the means by which the entity was created (*e.g.*, legislative, administrative or other governmental action);
- (2) the entity's performance of some essentially governmental function;
- (3) the extent of control and supervision of the entity exercised by government officials or agencies; and
- (4) whether the entity receives or expends public funds.

*See, EC-COI-94-7* (factors reviewed in state agency context); *EC-COI-92-26* (non-profit corporation is a municipal agency); *EC-COI-88-19* (non-profit corporation is not a municipal agency).

In addition, following the suggestion of the Supreme Judicial Court, the Commission also takes into consideration, when relevant, whether and to what extent there are significant private interests involved in the entity under review or whether the state or its political subdivisions have the powers and interests of an owner. *See EC-COI-94-7; MBTA v. State Ethics Commission*, 414 Mass. 582, (1993).

After considering the facts in light of those four factors and the additional consideration, we conclude that the Association is a private entity, not a municipal agency, within the meaning of the conflict of interest law.

### 1. Impetus for Creation

No statute, rule, regulation, order, ordinance or other law requires the Association to be created or to include municipal officials on its governing body. The Association was formed through the joint efforts of EOCD, municipal employees and agencies, and private parties to become a vehicle that enters into a contract to undertake and implement Downtown Projects through the Downtown Partnership model.

The Commission observed in *EC-COI-94-7*, that, although it was "clear that governmental action has in effect enhanced the market for" the services of the subject home care corporations, thereby causing such corporations to proliferate, those corporations were not **created** by government action. A similar observation can be made here, where governmental action, start-up funding and continued funding through the Subgrant Agreement has encouraged development of the Association, but it would not be accurate to say that the Association was **created** by government action.

In *EC-COI-88-19*, we considered a newly formed, non-profit corporation that was designated by a city pursuant to the city's cable television license agreement to manage and operate public, educational and local municipal access channels in the city and whose board of directors and executive director were selected by the city's mayor. There, we found that the corporation, having been created pursuant only to a contract with the city (rather than by law, rule or regulation), was not "governmentally created" despite the participation of governmental officials in its organizational efforts. Here similarly, although those who were instrumental in prompting the creation and procuring the funding for formation and initial operation of the Association were municipal employees,

the Association was formed to perform services under a contract - the Subgrant Agreement - not by law, rule or regulation.

The Association is distinguishable from the non-profit corporations that we found to have been governmentally created because the impetus for their creation was a governmental agency and they also **performed a legislatively mandated function** of the creating agency. See *EC-COI-90-3*; *89-24*; *84-147* (confirmed by *89-1*); *84-66* (all involving non-profit corporations established by state agencies); and *88-24* (where municipal officials in a municipal agency created a non-profit corporation to further the agency's statutory purpose). In *EC-COI-88-24*, the non-profit corporation was created by municipal officials to further the goals of the municipal agency in which they served; had as its executive director a senior administrator of the municipal agency; had a board of directors, one third of whom were employees of the municipal agency; had no staff or offices of its own, but rather borrowed staff members from and occupied offices of municipal agencies and took action only upon the direction of municipal agency personnel.

Here, by contrast, although some of the Downtown Projects that may be undertaken by the Association are similar to functions of City agencies, particularly the Community Development Office, on these facts we cannot readily conclude that the Association performs legislatively mandated functions of a City agency or agencies. The Association (having its own Manager, officers and consultants and its own offices, furnishings and equipment and having City employees constituting only a small minority of its Board and its membership and no City employees as its officers) is not inextricably entwined with the City. We are also mindful of the fact that EOCD's and the City's purpose in fostering the creation of the Association is to have it be a viable, independent entity after three years.

In sum, the Association was not created by statute, rule, regulation, order, ordinance or other law but rather stems from a contractual arrangement and does not appear to perform the legislatively mandated functions of a City agency. For those reasons, we conclude that the Association was not governmentally created.

## **2. Essentially Governmental Functions**

Depending on the particular Downtown Project, the Association's purposes and functions may or may not be governmental in nature. For example, sign, facade and landscaping improvements; parking and traffic planning and improvements; loans to small businesses and training could be public, private or mixed initiatives. It appears, however, that none of the Association's purposes, functions or Downtown Projects is so uniquely within the bailiwick of government<sup>10</sup> that they would be characterized as essentially governmental functions.

## **3. Whether the Entity Receives or Expend Public Funds**

Currently, the Association does indeed receive and expend the Grant monies pursuant to the Subgrant Agreement, a contractual arrangement. For purposes of this analysis, the Grant monies become municipal funds once EOCD awards and pays the Grant to the City. The Association is the City's contractor. The City has the absolute right, without cause, to terminate the Subgrant Agreement upon 15 days notice to the Association, in which case the City is only required to pay for services already provided and accepted. The City also has the right to withhold payment if it considers the Association's performance to be inadequate. The Association expects to develop and receive revenues from Other Funding Sources and, thus, to become financially independent of the City within three years, when additional Program funding is no longer available. Thus, while municipal monies may be expected to constitute the bulk of the Association's current revenues, municipal funding is not expected to be the sole or even the primary source of funding in the long-term.

Therefore, we conclude that the Association does indeed currently receive and expend municipal monies; however, we do not accord significant weight to this factor on the "public side" of the balance because that governmental funding situation appears to be temporary.

## **4. Extent of Municipal Control and Supervision**

Under the Subgrant Agreement, the City may be said to control and supervise the contractual undertakings of the Association in that the City can unilaterally terminate the Subgrant Agreement and/or (through its Community Development Director and Mayor) be the final arbiter of the adequacy of Association's contract performance

and whether the Association will be paid. However, the control and supervision does not extend to other aspects of the Association's operations, *e.g.*, hiring or engaging the Manager, legal and accounting advisers, architects and other consultants or making other management and operational decisions. Certainly, after the termination of the Subgrant Agreement and other comparable contracts that may be expected during the Program's usual 3-year funding period, it could not now be said that the City will control and supervise any aspect of the Association's activities.

The three City officials who are *ex officio* members of the Board do not and could not, even if they wished or were directed to, control the 15-member Board or the Association. In fact, it does not appear that the City even requires its officials to serve on the Board, which it presumably would if it sought to control the Association. Furthermore, whatever control the City may exert over the Association's operations through the three *ex officio* city employee/Board members is diluted because two of those three individuals serve only 1-year terms while most of the other Board members serve 3-year terms.

We conclude that, although the Association's performance of the Subgrant Agreement obligations may be controlled and supervised to some extent by the City, the Association is an independent corporate entity that is not controlled by the City.

As to the additional consideration suggested by the Court in the *MBTA* case, it appears to us that there are significant private interests involved in the Association because the vast majority of its members are affiliated with local businesses and the Association's purposes and projects are for their benefit. There is no indication that any property acquired by the Association with Subgrant or other funds will belong to anyone other than the Association or its members. Furthermore, the Downtown Projects are intended to revitalize the City's downtown area and will at the same time benefit local businesses, for example, in the form of loans and facade, signage and/or streetscape improvements.

After weighing all factors and considerations, we conclude that the Association is a private entity because it has significantly more attributes of a private entity than of a municipal agency.

## **B. Application of the Conflict of Interest Law to Ms. A's Situation**

### **1. Section 17**

Section 17(c) generally prohibits a municipal employee, "otherwise than in the proper discharge of official duties," from acting as agent or attorney for anyone other than the municipality in connection with any particular matter<sup>11/</sup> in which the municipality is a party or has a direct and substantial interest.<sup>12/</sup> The rationale behind this is that public employees should be loyal to their municipal employers, and where their loyalty to their municipal employers conflicts with their loyalty to a private party or employer, the municipality's interest must win out. *See EC-COI-82-176* (involving §4, the state counterpart to §17).

Under §17(c), Ms. A may not, for example, represent or personally appear on behalf of the Association (whether formally or informally, whether through written or oral communications and whether in person or otherwise) to or before any City agency<sup>13/</sup> or personnel, EOCD or anyone else in connection with the Association's performance of its contractual obligations under the Subgrant Agreement, the Subgrant or any other matters in which the City has a direct and substantial interest, including any future Program subgrant. "Personally appearing" includes any contact with the intent to influence. *EC-COI-92-1; 87-27.*

That prohibition may be tempered if Ms. A's representation of the Association's interests is in the proper discharge of her official duties as a member of the Historic Commission. If the Council were explicitly and specifically to describe or approve Ms. A's municipal duties so as to include her representation of the Association in certain situations and/or before certain bodies or personnel, then she could generally perform those authorized functions in the proper discharge of her official duties. The Council's awareness that Ms. A serves on the Historic Commission and also as a member of the Association's Board does not by itself constitute official affirmation. *See EC-COI-83-20* (involving §4, the state counterpart to §17(c), in which the Commission suggested that a state employee required a written statement from his state agency describing or approving his representation of an individual employee of the agency). If the Council does not so expand Ms. A's municipal duties, then she may not so represent the Association.

## 2. Section 19

Section 19, in relevant part, prohibits a municipal employee from participating as such an employee in any particular matter<sup>14/</sup> in which (to his knowledge) he or a business organization<sup>15/</sup> in which he serves as an officer, director, trustee, partner or employee has a financial interest unless the employee first receives an exemption. “Participation”<sup>16/</sup> includes both formal and informal lobbying of colleagues, reviewing and discussing, giving advice and making recommendations, as well as deciding and voting on particular matters. *EC-COI-92-30*. The financial interest may be of any size and may be either positive or negative. *EC-COI-84-96*. It must, however, be direct and immediate or reasonably foreseeable in order to implicate §19. *EC-COI-86-25; 84-123; 84-98; 84-96*.

Notwithstanding that general prohibition, an appointed municipal employee may participate in such a matter if he first obtains an exemption under §19(b)(1) by (i) giving his appointing official written notice of the nature and circumstances of the particular matter and making full disclosure of the financial interest and (ii) receiving a written determination from that official that the interest is not so substantial as to be deemed likely to affect the integrity of the services that the municipality may expect from the employee.

As applied to this case, if the Historic Commission were asked to consider a particular matter that would reasonably foreseeably affect the Association’s financial interest, Ms. A must abstain from participating in any aspect of such matter unless she has first receives an exemption determination, as described above. For example, if the Historic Commission were charged with disbursing historic renovation grant monies and the Association were an applicant or potential recipient, Ms. A would need an exemption in order to participate.

## 3. Section 23

Section 23 imposes standards of conduct that are applicable to all public employees.

Section 23(b)(3), the so-called “appearances” section, is pertinent to Ms. A’s situation. It prohibits a public employee from acting in a manner that would cause a reasonable person to conclude that anyone can improperly influence him or unduly enjoy his favor in the performance of his official duties. The section requires the employee to dispel any such “appearance” by making a written disclosure of the relevant facts.

Thus, even if §19 would not require Ms. A to abstain from participating in Historic Commission matters because such matters do not affect the Association’s financial interests, if such matters are likely to affect other Association interests, Ms. A should file a written disclosure of all relevant facts to her appointing authority. She should also make a similar oral, public disclosure for inclusion in the minutes of the Historic Commission’s meeting(s) at which such matters are reviewed, considered, voted or otherwise acted upon.

For example, if the Association were to publicly express its support for or opposition to a construction project being proposed by an Association member (or anyone else, for that matter) and part of the project required Historic Commission review and approval, Ms. A would be required to make such disclosure prior to participating in the matter.

**DATE AUTHORIZED:** September 13, 1995

<sup>1/</sup>HUD awards such CDBG grants directly to larger cities without EOCD involvement.

<sup>2/</sup>EOCD derived its model for Downtown Partnerships from The National Trust for Historic Preservation’s National Main Street Center concept, through which public- and private-sector representatives join together to work on various projects.

<sup>3/</sup>According to EOCD and City personnel, there is no federal, state or local requirement that municipal officials so serve.

<sup>4/</sup>It appears from the By-Laws that the *ex officio* Board members have the same rights and obligations (including voting) as all other members.

<sup>5/</sup>One of those business representatives is also a member of the Council; another is also a member of the City’s Zoning Board of Appeal.

We are informed that they serve on the Board in their private capacities, not as City officials or representatives.

<sup>6</sup>When the Council adopted its resolution, its members presumably knew that the Board included the three *ex officio* City officials. However, it does not appear that the City requires the three City officials to so serve.

<sup>7</sup>The \$[amount omitted] difference between the Grant and Subgrant amounts was paid under a separate contract for the traffic and parking study done before the Association was in operation.

<sup>8</sup>The City's Chief Planner in the Community Development Office has acted as a liaison between the Association and the City, but he is not a member of the Association's staff, nor is his City salary funded with Grant or Subgrant monies.

<sup>9</sup>"Municipal agency," any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder. G.L. c. 268A, §1(f).

<sup>10</sup>For example, responsibility for police and fire services, municipal infrastructure (water, sewer, drainage, streets) and public school education are classic essential governmental services.

<sup>11</sup>"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

<sup>12</sup>As Ms. A is not compensated for being a member of the Board, the constraints contained in §17(a) are not relevant here.

<sup>13</sup>"Municipal agency," any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder. G.L. c. 268A, §1(f).

<sup>14</sup>"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

<sup>15</sup>A non-profit corporation is a "business organization" within the meaning of the conflict law. *EC-COI-88-4*.

<sup>16</sup>"Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).